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August 2, 2012

Ms. Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12th Street, SW  
Washington, D.C. 20554

**Re: Notification of Ex Parte Presentations of Anda, Inc., Regarding Petition for Declaratory Ruling to Clarify That 47 U.S.C. § 227(b) Was Not the Statutory Basis for Commission's Rule Requiring an Opt-Out Notice for Fax Advertisements Sent with Recipient's Prior Express Consent, CG Docket No. 05-338 (filed Nov. 30, 2010)**

Dear Ms. Dortch:

On July 31, 2012, Roberta Loomar of Anda, Inc. ("Anda"), along with the undersigned and Matthew Murchison, both of Latham & Watkins LLP, met with FCC General Counsel Sean Lev, as well as with Peter Karanjia, Richard Welch, Diane Holland, Raelynn Remy, Laurel Bergold, Marcus Maher, Kris Monteith, Mark Stone, and Kurt Schroeder in connection with Anda's Petition for Declaratory Ruling and Application for Review in the above-mentioned docket.

At this meeting, we discussed the uncertain legal basis for Section 64.1200(a)(3)(iv) of the Commission's rules, which provides that commercial faxes sent with the prior express consent of the recipient must contain the same opt-out notice that appears on unsolicited fax advertisements.<sup>1</sup> We noted that Anda had filed a Petition for Declaratory Ruling in November 2010 asking the Commission to identify the rule's statutory basis, but that the Commission's Consumer and Governmental Affairs Bureau issued an Order nearly a year-and-a-half later summarily dismissing the Petition.<sup>2</sup> We urged the Commission to act quickly on Anda's pending Application for Review of that Order, and to clarify that Section 227(b) of the Communications Act, which governs only unsolicited faxes, was not the statutory basis for the rule in question.

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<sup>1</sup> 47 C.F.R. § 64.1200(a)(3)(iv).

<sup>2</sup> *See Junk Fax Prevention Act; Petition for Declaratory Ruling to Clarify That 47 U.S.C. § 227(b) Was Not the Statutory Basis for Commission's Rule Requiring an Opt-Out Notice for Fax Advertisements Sent with Recipient's Prior Express Consent*, CG Docket No. 05-338, Order, DA 12-697 (CGB rel. May 2, 2012) ("CGB Order").

We explained that if the Commission does not clarify that Section 64.1200(a)(3)(iv) was adopted pursuant to authority other than Section 227(b), class action lawsuits alleging technical violations of that provision will continue to threaten legitimate businesses with massive unwarranted liability based solely on consensual communications with their customers. By jeopardizing Anda's continued viability (not to mention the viability of other senders of solicited, business-to-business fax communications facing similar litigation risks), these lawsuits also endanger the tens of thousands of pharmacies—many of which cannot afford to keep significant amounts of generic pharmaceuticals in stock—that rely on Anda to fill orders of any size on short notice.

Anda explained that its position in this proceeding is consistent with the position it has taken before the courts. Anda has always maintained—in its Petition, in meetings with staff, and in the Application for Review—that if the rule at issue arose under Section 4(i) or 303(r), the Commission should so clarify in a declaratory ruling and thereby dispel the notion that a technical violation of the rule triggers Section 227's private right of action. If, however, the Commission takes the position that the rule arose solely under Section 227(b)—a position seemingly endorsed by the staff's Order<sup>3</sup> and in the Commission's *amicus* brief in the Eighth Circuit's *Nack* case<sup>4</sup>—Anda believes the rule would exceed the statute's grant of rulemaking authority, which extends only to rules governing “unsolicited advertisements,”<sup>5</sup> and could be invalidated on that basis.<sup>6</sup>

Anda also reiterated its position that expansively interpreting Section 227(b) as authorizing regulation of *solicited* faxes would raise serious First Amendment concerns. Under *Central Hudson*, courts apply intermediate scrutiny to rules that regulate legitimate commercial speech.<sup>7</sup> Accordingly, courts have upheld Section 227's requirements for *unsolicited* faxes only after the government had pointed to “a substantial interest in . . . prevent[ing] the cost shifting and interference such unwanted advertising places on the recipient,” and had demonstrated that the requirements were narrowly tailored because advertisers remained free to “obtain consent for their faxes.”<sup>8</sup> As Anda has explained in its Petition and in the pending Application for Review,

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<sup>3</sup> See CGB Order ¶ 7.

<sup>4</sup> See Amicus Br. for the Federal Communications Commission Urging Reversal at 20, *Nack v. Walburg*, No. 11-1460 (8th Cir. Feb. 24, 2012).

<sup>5</sup> See 47 U.S.C. § 227(b)(2)(D),

<sup>6</sup> See Amicus Br. of Anda, Inc. in Support of Appellee at 11, *Nack v. Walburg*, No. 11-1460 (8th Cir. Jul. 20, 2012) (“*To the extent* this Court agrees with the FCC that the Regulation was promulgated pursuant to 47 U.S.C. § 227(b), the Regulation is *ultra vires* and should be declared unlawful and set aside by this Court.”) (internal quotation marks omitted and emphasis added).

<sup>7</sup> *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm’n*, 447 U.S. 557, 564 (1980).

<sup>8</sup> *Missouri v. AM Blast Fax*, 323 F.3d 649, 655, 659 (8th Cir. 2003); see also *Destination Ventures v. FCC*, 46 F.3d 54, 56, 57 (9th Cir. 1995) (articulating “the government’s substantial interest in preventing the shifting of advertising costs to consumers” and

these justifications vanish where, as here, the recipient *has* provided express consent to receive such faxes.

The Supreme Court's decision in *Zauderer*, which applied a lower level of scrutiny to a disclosure requirement for legal advertisements, is distinguishable.<sup>9</sup> While the requirement at issue in *Zauderer* could be satisfied with a simple, unobtrusive disclaimer,<sup>10</sup> the Commission's opt-out notice rule effectively commandeers the content of fax communications by requiring a detailed notice that provides step-by-step instructions for opting out of future communications and that must be "clear and conspicuous and on the first page of the advertisement."<sup>11</sup> In addition, because an entity that fails to include such a notice may be held strictly liable for statutory damages of \$500 per violation<sup>12</sup>—an amount that quickly adds up for companies like Anda that routinely send solicited faxes to their many customers—the penalty imposes a tremendous burden on legitimate senders of consensual fax communications. The threat of such penalties has a profound chilling effect on advertisers' speech, and if these enterprise-crippling penalties are actually imposed, they could put an end to an advertiser's speech altogether. In any event, even if the lower level of scrutiny in *Zauderer* were applicable here, the Commission would be hard-pressed to show that the rule is "reasonably related" to an "interest in preventing deception of consumers."<sup>13</sup> The rule presumably was intended simply as a convenience to remind recipients who had opted in to fax communications how to opt out. The Commission's true intent is impossible to discern, however, as the 2006 order adopting the rule failed to identify *any* rationale for the rule, let alone one related to preventing "deception," and the underlying Notice of Proposed Rulemaking failed to mention any proposal to expand application of the statutory opt-out notice requirement beyond unsolicited advertisements.<sup>14</sup>

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finding that "*unsolicited* fax advertisements shift significant advertising costs to consumers") (emphasis added).

<sup>9</sup> *Zauderer v. Office of Disciplinary Counsel of Supreme Court*, 471 U.S. 626 (1985).

<sup>10</sup> *Id.* at 653 & n.15.

<sup>11</sup> See 47 C.F.R. § 64.1200(a)(3)(iv) (requiring faxes sent with the recipient's express consent to "include an opt-out notice that complies with the requirements in paragraph (a)(3)(iii) of this section"); *id.* §§ 64.1200(a)(3)(iii)(A)-(E) (setting forth the required contents of the opt-out notice).

<sup>12</sup> See 47 U.S.C. § 227(c)(5)(B).

<sup>13</sup> *Zauderer*, 471 U.S. at 651.

<sup>14</sup> See *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; Junk Fax Prevention Act of 2005*, Report and Order and Third Order on Reconsideration, 21 FCC Rcd 3787 ¶ 48 (2006) (announcing the rule in a single sentence); *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; Junk Fax Prevention Act of 2005*, Notice of Proposed Rulemaking and Order, 20 FCC Rcd 19758 ¶¶ 19-23 (2005) (discussing the adoption of an opt-out notice requirement applicable only to "unsolicited facsimile advertisements").

LATHAM & WATKINS<sup>LLP</sup>

Please contact the undersigned if you have any questions regarding these issues.

Sincerely,

*/s/ Matthew A. Brill*

Matthew A. Brill  
*Counsel for Anda, Inc.*